HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

HIGH MAINTENANCE BITCH, LLC, a Washington LLC,

Plaintiff,

v.

UPTOWN DOG CLUB, INC., a Texas Corporation,

Defendant.

Case No. C07-0888TSZ

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

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I. INTRODUCTION

Filing a lawsuit in Federal Court is a serious matter – especially a patent infringement lawsuit. A plaintiff and its attorneys are expected to have done their homework prior to filing, which includes performing a reasonable pre-filing investigation. Part of that pre-filing investigation includes purchasing an accused infringing product[1] and verifying that personal jurisdiction is proper in the forum court. High Maintenance Bitch and its attorneys have performed neither of these basic inquiries.[2] In fact, High Maintenance Bitch still refuses to identify which products are accused of infringement, stating that Uptown Dog will have to infer which products are actually accused of infringement.[3] This type of gamesmanship should not be tolerated by a Federal Court and are grounds for dismissal.

Contrary to *Judin*, High Maintenance Bitch did not purchase a cheap $13.00 dog collar prior to filing this lawsuit to fulfill its obligation to perform an adequate pre-filing investigation. To further complicate matters, High Maintenance Bitch is solely relying upon Uptown Dog's website and alleged national advertising to assert personal jurisdiction – which the Federal Circuit has held as an inadequate basis to find personal jurisdiction.[4]

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[1] *Judin v. U.S.*, 110 F.3d 780, 784 (Fed. Cir. 1997) (the district court abused its discretion in not granting Rule 11 sanctions against a patentee who failed to obtain an inexpensive sample of the product as part of its pre-filing investigation); *see also*, *Eon-Net, L.P. v. Flagstar Bancorp, Inc.*, 239 F.R.D. 609, 615 (D. Wash. 2006) (Rule 11 sanctions imposed partially for failure to identify the accused products).

[2] High Maintenance Bitch does not contest that it has not purchased an accused product from Uptown Dog.

[3] Opposition at 15:18-20.

[4] *Xactware, Inc. v. Symbility Solution Inc.*, 402 F.Supp.2d 1359, 1365 (D. Utah 2005) (quoting *Trintec Indus., Inc. v. Pedre Promotional Prods., Inc.*, 395 F.3d 1275, 1281 (Fed.Cir.2005) and *GTE New Media Services Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349 (D.C.Cir.2000)).

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The Court should dismiss this action and award Uptown Dog its reasonable attorney fees incurred in defending against this frivolous action. Alternatively, this Court should transfer this matter to the N.D. of Texas where this matter should have been brought – a forum that will have jurisdiction over the Uptown Dog and its supplier of products – assuming this case warrants being filed.

II. HIGH MAINTENANCE BITCH REFUSES TO IDENTIFY THE PRODUCT(S) THAT ARE ACCUSED OF INFRINGEMENT

To this day, High Maintenance Bitch refuses to identify the product(s) that are accused of infringement.[5] Granted the Federal Rules of Civil Procedure allow for notice pleadings but a plaintiff is required to provide (1) ***a short and plain statement of the grounds upon which the court's jurisdiction depends*** and (2) ***a short and plain statement of the claim showing that the pleader is entitled to relief***.[6] Without identifying the product, High Maintenance Bitch has failed to present a basis stating why it is entitled to any relief. In a design patent infringement suit, the fact finder must (1) compare the two designs from the viewpoint of the ordinary observer to determine whether the patented design as a whole is substantially the same as the accused design; and (2) determine the "point of novelty" of the patents to make sure the accused device appropriates the novelty in the patented device which distinguishes it from the prior art.[7] Whether this is an easier task than a utility patent infringement matter, as claimed by High Maintenance Bitch,[8] is open to debate.

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[5] Opposition at 15:18-20.

[6] Fed. R. Civ. P. 8(a).

[7] *See, Lawman Armor Corp. v. Winner International LLC*, 437 F.3d 1383 (Fed.Cir. 2006) (to determine infringement of a design patent, a court must apply two distinct tests: (a) the ordinary observer test; and (b) the "point of novelty test").

[8] Opposition at 10: 14-21.

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As presented in Uptown Dog's opening brief, the Complaint fails to assert even one fact that connects Uptown Dog with this forum. Because of this critical deficiency and High Maintenance Bitch's refusal to provide such information in communications with Uptown Dog or in its Opposition, the Court has no choice other than to dismiss this action.[9]

III. HIGH MAINTENANCE BITCH FAILS TO PROVE THAT UPTOWN DOG PURPOSEFULLY DIRECTED ACTIVITIES AT WASHINGTON

A. Personal Jurisdiction in a Patent Infringement Case is Determined Under Federal Circuit Case Law.

High Maintenance Bitch is only alleging that specific jurisdiction exists in this case. The Federal Circuit has established a three part test to determine whether specific personal jurisdiction exists, as follows: "(1) whether the defendant purposefully directed activities at residents of the forum, (2) whether the claim arises out of or relates to those activities, ***and*** (3) whether assertion of personal jurisdiction is reasonable and fair."[10]

B. Uptown Dog Did Not Purposefully Direct Any of Its Activities Towards Residents of Washington State

1. Uptown Dog does not target activities specifically towards Washington.

High Maintenance Bitch does not provide any statements that specifically connect Uptown Dog to Washington. In its failed effort to present a case for personal jurisdiction, High Maintenance Bitch relies upon Uptown Dog's website and Uptown Dog's alleged presence in magazines with a national audience. As stated in its opening brief and uncontested by High Maintenance Bitch, Uptown Dog does not direct any of its activities towards Washington. The mere fact that Uptown Dog has appeared in many magazines does not give

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[9] *See*, *Pennington Seed Inc. v. Produce Exchange No. 299*, 79 USPQ2d 1777 (Fed. Cir. 2006) (the district court properly dismissed an action because the complaint lacked sufficient allegations of minimum contacts to establish personal jurisdiction); *Snyder v. Pinal*, C.A. No. 02-124-GMS (D. Del. 2002).

[10] *3D Sys., Inc. v. Aarotech Lab., Inc.*, 160 F.3d 1373, 1378 (Fed.Cir.1998).

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rise to specific jurisdiction unless High Maintenance Bitch can clearly demonstrate that its cause of action relates to that specific appearance in a magazine directed specifically towards Washington, which it has not done or can do.

Furthermore, High Maintenance Bitch overstates what is displayed on Uptown Dog's website. As expressly stated on its website, Uptown Dog states it has been "seen in" the listed periodicals. Many of the noted periodicals contain articles featuring Uptown Dog and are not incidents where Uptown Dog placed an advertisement for its products.[11] Thus, High Maintenance Bitch's blanket assertion lacks any merit and is irrelevant to determining whether personal jurisdiction exists.

Regarding the *Seattle Dog* periodical, it will not publish until September 2007 (*i.e.*, almost 3 months following the filing of the Complaint). It will feature an article by Lisa Woody, who was asked to write an article titled "Gotta Have It." Her proposed article will merely refer readers to local Seattle businesses where readers can purchase featured products for their pets.[12] Therefore, Lisa Woody's article in no way supports a finding of personal jurisdiction in this matter and her presence in the magazine cannot support a finding of personal jurisdiction because the magazine was not available to the public prior to the filing of this lawsuit.

2. High Maintenance Bitch's post-filing contact with Uptown Dog does not support a finding of personal jurisdiction.

Some 55 days after filing the Complaint and realizing that High Maintenance Bitch and its attorneys did not perform an adequate pre-filing investigation, High Maintenance Bitch attempted to manufacture a contact between Uptown Dog and Washington. High

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[11] See Declaration of Lisa Woody in Support of Defendant's Reply To Plaintiff's Opposition To Motion To Dismiss ("Woody 2 Decl.") at ¶ 3.

[12] Woody 2 Decl. at ¶ 4.

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Maintenance Bitch's representative apparently communicated with Uptown Dog, outside the presence of Uptown Dog's counsel. From the modified transcript, the only topic that was discussed was whether Uptown Dog is capable of shipping products throughout the United States. There is no discussion regarding the "customer's" residence.[13] Moreover, no purchase of any product occurred. As with all of High Maintenance Bitch's arguments, the transcript does not aid the Court in determining whether personal jurisdiction exists over Uptown Dog.

Furthermore, this type of unilateral activity taken by High Maintenance Bitch has been found to be irrelevant by this Court and its sister courts in deciding whether personal jurisdiction exists over a defendant. In *Amazon.com Inc. v. Kalaydjian*, 58 USPQ2d 1247, 1251-52 (W.D. Wash. 2001), the Honorable Judge Rothstein found that one bottle of perfume most likely shipped to the plaintiff was an isolated act and insufficient to establish the type of purposeful availment activity required to hold that defendant be subject to jurisdiction in Washington. In *Xactware, Inc. v. Symbility Solution Inc.*, 402 F.Supp.2d 1359 (D. Utah 2005), the district court found that the plaintiff's attempt to purchase solutions from an out of state defendant after the filing, did not support the finding of jurisdiction, citing *Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1359 (Fed.Cir.1998) (finding that random, fortuitous, attenuated contacts, or unilateral activity of others do not count in determining minimum contacts calculus). In *Millennium Enterprises, Inc. v. Millennium Music, L.P.*, 33 F.Supp.2d 907 (D. Or. 1999) (quoting *Edberg v. Neogen Corp.*, 17 F.Supp.2d 104, 112 (D. Conn. 1998)), the district court reprimanded the plaintiff's attempt to manufacture jurisdiction by purchasing a single compact disc through the defendant's website. The district court stated:

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[13] *See* Opposition at 11:5-9 and Declaration of Danny Bronski.

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> Such questionable and unprofessional tactics cannot subject defendants to jurisdiction in this forum. "Only those contacts with the forum that were created by the defendant, rather than those manufactured by the unilateral acts of the plaintiff, should be considered for due process purposes."

3. Other district courts have dismissed cases based upon similar facts.

Recently in *Xactware, Inc. v. Symbility Solution Inc.*, 402 F.Supp.2d 1359 (D. Utah 2005), a district court analyzed facts that are remarkably similar to the facts before this Court when it dismissed a patent infringement case for lack of personal jurisdiction.[14] Like Uptown Dog, the *Xactware* defendant's only contact with the forum state was an interactive website that allowed forum state residents to view/order material from its website and its presence at a national trade show. There was no evidence that any forum resident even viewed the website, let alone purchased the alleged infringing software. The district court found that these facts did not warrant finding personal jurisdiction over the defendant because the Federal Circuit previously held that a website alone is not enough to find personal jurisdiction because a website "by itself does not by itself show any persistent course of conduct by defendants in [the forum state]."[15]

Like *Xactware*, Uptown Dog does not have any significant contacts with Washington or any persistent course of conduct in Washington. The only contact that could be asserted is an interactive website that allows Washington State residents to purchase products from

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[14] *See Xactware, Inc. v. Symbility Solution Inc.*, 402 F.Supp.2d 1359 (D. Utah 2005).

[15] *Xactware* at 1365 (quoting *Trintec Indus., Inc. v. Pedre Promotional Prods., Inc.*, 395 F.3d 1275, 1281 (Fed.Cir.2005); *see also*, *Quality Improvement Consultants Inc. v. Williams*, 2003 U.S. Dist. LEXIS 2705, *16, 17-19 (D. Minn. Feb. 24, 2003) (the mere existence of a Web site on which purchases can be made was not sufficient to warrant personal jurisdiction); *Molnlycke Health Care AB v. Dumex Medical Surgical Products Ltd.*, 64 F. Supp. 2d 448 (E.D. Pa. 1999) (no jurisdiction in patent infringement case where defendant advertised his products on site and allowed purchases directly from site, but no evidence of significant sales in Pennsylvania); *Mink v. AAAA Development LLC*, 190 F.3d 333 (5th Cir. 1999) (no jurisdiction over copyright infringement case where defendant's site advertised allegedly infringing software code but had made no sales into Texas); *Precision Craft Log Structures Inc. v. Cabin Kit Co.*, 78 USPQ2d 1053 (D. Idaho 2006).

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Uptown Dog. Uptown Dog does not direct any advertisement towards Washington residents. Therefore, Uptown Dog has not "intentionally directed" or "expressly aimed" its activity at Washington residents.[16] Therefore, High Maintenance Bitch has failed the first prong of the Federal Circuit's three part test and the Court must dismiss this case for lack of personal jurisdiction. To find otherwise, the constitutional assurances built into the law of personal jurisdiction "would be shredded."[17]

C. High Maintenance Bitch's Claim Does Not Arise From or Relate to Purposeful Activities Within Washington.

The second step in the Federal Circuit's analysis presents an even higher hurdle for High Maintenance Bitch to overcome.[18] There are no allegations that identify Uptown Dog's specific activities within Washington that give rise to High Maintenance Bitch's claims. Without any support, High Maintenance Bitch merely states that it believes that Uptown Dog has made sales of an undisclosed patented product to Washington.[19] Even if High Maintenance Bitch does decide to identify which products are accused of infringement, a single sale of an accused product is typically not enough to find jurisdiction over an out-of-state defendant.[20] A corporation's sales to forum residents must be more than "isolated occurrences for the assertion of jurisdiction to satisfy the requirements of due process."[21]

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[16] *Xactware* at 1363 (citing *iAccess, Inc. v. WEBcard Technologies, Inc*., 182 F.Supp.2d 1183, 1186 (D.Utah 2002); *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987); *Calder v. Jones*, 465 U.S. 783, 789-90 (1984)).

[17] *GTE New Media Servs. Inc. v. BellSouth Corp*., 199 F.3d 1343, 1350 (D.C. Cir.2000); *see also*, *Xactware* at 1364.

[18] *See, 3D Systems*, 160 F.3d at 1378; *accord Hanson v. Denckla,* 357 U.S. 235, 251 (1958) and *Nova Mud Corp. v. L.H. Fletcher*, 648 F.Supp. 1123, 1126 (D.Utah 1986).

[19] Opposition at 10:23-24.

[20] Uptown Dog admits it delivered one boa feather dog collar to Washington that retailed for $14.99.

[21] *Burger King v. Rudzewicz*, 471 U.S., 462, 475-76 n.18 (1985) (the purposeful availment

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In *iAccess*, a district court found that one $20.00 purchase by a forum individual was not a sufficient nexus with the forum residents and the website.[22] In *Shamsuddin v. Vitamin Research Products*, 346 F.Supp.2d 804 (D. Md. 2004), the district court held that two sales to forum residents from a commercial website did not rise to the level of contacts of such "quality and nature" that the exercise of personal jurisdiction over the defendant would comport with due process. Similarly, in *Amazon.com Inc. v. Kalaydjian*, 58 USPQ2d 1247, 1251-52 (W.D. Wash. 2001), this Court found that one bottle of perfume shipped to Washington was an isolated act and insufficient to establish the type of purposeful availment activity required to hold that defendant to be subject to jurisdiction in Washington. Likewise, this Court should find that High Maintenance Bitch has not produced any evidence to demonstrate the existence of a nexus to purposely availed activities via the Internet or otherwise. Therefore, High Maintenance Bitch has also failed the second prong of the Federal Circuit's three part test and the Court must dismiss this case for lack of personal jurisdiction.

D. The Assertion of Washington Jurisdiction Over Uptown Dog Would not be Reasonable and Fair.

Because High Maintenance Bitch has not sufficiently established either of the first two prongs of the Federal Circuit's analysis, this Court must find under the third prong that the assertion of personal jurisdiction would be unreasonable and unfair.[23]

If the Court were to analyze the third prong, reasonableness is determined by balancing several factors, namely: "(1) the burden on the defendant; (2) the interests of the forum state;

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requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous', or 'attenuated' contacts.") (citations omitted).

[22] *iAccess, Inc.*, 182 F.Supp.2d at 1189.

[23] See *3D Sys.*, 160 F.3d at 1378.

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(3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the interest of the states in furthering their social policies."[24] As stated in Uptown Dog's opening brief, these factors show that subjecting Uptown Dog to personal jurisdiction in Washington would be unfair and unreasonable because the defendant would be extremely burdened being forced to litigate in a court some 2000 miles from its home town.

High Maintenance Bitch's discussion of these factors is interesting but not persuasive. High Maintenance Bitch takes issue with Lisa Woody's declaration stating that other than Lisa Woody and Elaine Bennett, Uptown Dog has only two part-time employees. Although the website may imply otherwise, the majority of those people are not employed by Uptown Dog. They have assisted in its limited success by donating time and emotional support. Furthermore, the climate-control smoke-free warehouse noted by High Maintenance Bitch is the air-conditioned bedrooms of Ms. Bennett's home.[25] As a result, nothing raised by High Maintenance Bitch has contradicted the fact that ***Uptown Dog is a small business operated from Ms. Bennett's Frisco, Texas home***. It would be unfair to subject Uptown Dog to the jurisdiction of this Court.

E. High Maintenance Bitch's Policy Arguments are Irrelevant.

Only those contacts with the forum that were created by the defendant should be considered for due process purposes.[26] High Maintenance Bitch's ability to enforce its patents is unsubstantiated and totally irrelevant in the decision of whether personal jurisdiction

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[24] *Viam Corp. v. Iowa Export-Import Trading Co.*, 84 F.3d 424, 429 (Fed. Cir. 1996) (citing *World-Wide Volkswagen*, 444 U.S. at 292).

[25] Woody 2 Decl. at ¶¶ 5-6.

[26] *Millennium Enterprises, Inc. v. Millennium Music, L.P.*, 33 F.Supp.2d 907 (D.Or. 1999) (quoting *Edberg v. Neogen Corp.*, 17 F.Supp.2d 104, 112 (D. Conn. 1998)).

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exists.[27] It is ironic that High Maintenance Bitch was able to spend "tens of thousands of dollars to protect its three creative designs for dog collars"[28] but it cannot "afford to litigate one case in Texas."[29] Although it may be unfortunate that High Maintenance Bitch cannot afford to litigate these patents in jurisdictions where it believes the actual infringement is occurring, it is not justification to force Uptown Dog to sacrifice its constitutional rights to benefit High Maintenance Bitch. The social policies behind the patent statute have never been used to override the Due Process Clause of the U.S. Constitution. Accordingly, High Maintenance Bitch presents no authority to rule otherwise.

High Maintenance Bitch's claims regarding the most efficient resolution of this controversy is for Uptown Dog to provide documentation of its sales.[30] Once again, this factor is baseless and irrelevant to personal jurisdiction issues. First, the most efficient way to resolve this case is for High Maintenance Bitch to dismiss this action and refile it in the N.D. of Texas where the court has jurisdiction over Uptown Dog and the supplier of the accused products. By not including the supplier of the accused products, High Maintenance Bitch will be forced to do piece-meal litigation which could result in multiple cases having to be filed rather than a single action in one court with jurisdiction over the true accused infringing party (*i.e.*, the supplier of the accused products).

Also, High Maintenance Bitch's belief that damages are more extensive than this amount is unfounded and totally speculative.[31] Contrary to High Maintenance Bitch's

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[27] Opposition at 10-11.

[28] Opposition at 14:13.

[29] Opposition at 14:23.

[30] Opposition at 11-12.

[31] Opposition at 2:17-18.

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statements, Uptown Dog has attempted to settle this matter without taking up the Court's valuable resources for this *de minimis* case. However, High Maintenance Bitch will not inform Uptown Dog or this Court which products are accused of infringement and therefore, Uptown Dog was forced to defend itself by filing this motion. Moreover, because High Maintenance Bitch has refused to identify the accused products, Uptown Dog has incurred unnecessary legal costs because it has been prevented from tendering its defense to the actual supplier of the accused products.[32]

Finally, High Maintenance Bitch's request for limited discovery should be denied. Under the Federal Rules of Civil Procedure, district courts have broad discretion in considering requests for jurisdictional discovery. Because High Maintenance Bitch's claims regarding jurisdiction is based on pure speculation, no discovery is warranted.[33]

IV. UPTOWN DOG SHOULD BE AWARDED ITS REASONABLE ATTORNEY FEES AND COSTS IN DEFENDING AGAINST THIS ACTION

Because High Maintenance Bitch cannot meet its burden and prove that this Court has personal jurisdiction over Uptown Dog, this Court should order High Maintenance Bitch to pay Uptown Dog its reasonable attorney fees and costs in defending against this frivolous suit pursuant to RCW § 4.28.185. The law was designed to protect parties like Uptown Dog from unwarranted litigation tactics as presented in Uptown Dog's motion.

V. THIS CASE SHOULD ALSO BE DISMISSED BECAUSE OF IMPROPER VENUE

Because Uptown Dog does not reside in Washington, does not have a place of business in Washington, and has not committed an act of infringement in Washington, and having

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[32] Woody 2 Decl. at ¶8.

[33] *See, Shamsuddin v. Vitamin Research Products*, 346 F.Supp.2d 804 (D. Md. 2004).

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demonstrated that this Court does not have personal jurisdiction over Uptown Dog, it follows that venue is not proper in this Court.

VI. ALTERNATIVELY, THE COURT SHOULD TRANSFER THIS ACTION TO THE DISTRICT OF TEXAS

For the reasons presented in Uptown Dog's opening paper, if the Court finds personal jurisdiction exists, it should transfer this matter to the N.D. of Texas. High Maintenance Bitch did not provide any factual basis that would prevent this Court from exercising its discretion with only conclusionary statements by High Maintenance Bitch. It is important to note, that subpoena power of this Court may not be able to reach the supplier of the accused products. However, if this matter was transferred to the N.D. of Texas, the Texas court would most likely have subpoena power over the supplier and would allow for a more efficient resolution. This is a consideration under Ninth Circuit law.[34] Indeed, it appears that every witness (other than the plaintiff) would be from Texas, and thus the cost to travel and secure these witnesses would be great in the event of a trial in Seattle. Thus, this factor heavily favors the Northern District of Texas.

VII. CONCLUSION

Because High Maintenance Bitch cannot meet its burden in proving that Uptown Dog is subject to the jurisdiction of this Court, this Court must dismiss this action and should award Uptown Dog its reasonable attorney fees. Alternatively, if the Court finds that personal jurisdiction exists, the Court should transfer this matter to the Northern District of Texas and order High Maintenance Bitch to identify which products are accused of infringement.

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[34] *See*, *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

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DATED: August 17, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August, 2007, the foregoing Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss was filed with the Court using the CM/ECF system which will send notification of such filing to the following:

Daniel M Bronski
danny@veritrademark.com

Dated this 17th day of August, 2007.

By: /s/ Steven P. Fricke

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